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March 21, 2011

**VIA E-MAIL**

Mr. Joe Karkoski  
Mr. Adam Laputz  
Irrigated Lands Conditional Waiver Program  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670-6114

**Re: Irrigated Lands Framework**

Dear Joe and Adam:

Notwithstanding the Regional Board's issuance of the five official CEQA alternatives for the Irrigated Lands Program (ILP) and that these alternatives were the subject of many meetings/discussions/submittals of comments, the staff subsequently advanced a staff preferred alternative (Alternative 6), which has still not been CEQA reviewed. This breach of administrative procedure and CEQA protocols was of significant distress to the regulated community. The staff next released a seventh entirely new proposal dealing with coalition qualifications for the ILP program. Now, subsequent to all of that, the Regional staff has just advanced (in early March) many further restrictions in yet another alternative (Alternative 8) calling for written comments to be filed by March 21st (15+ days), leading to a noticed hearing on April 7/8, 2011. Follows are a few comments as to the many new provisions of this new waiver document called a "Framework", which involves 35 pages of Executive Summary and 32 pages of actual waiver language in Appendix A.

1. The waiver now advances a new three tier regulatory structure: a) Tier 1, low threat; b) Tier 2, unknown threat; and c) Tier 3, high threat. High threat areas are those with any water quality exceedances. For groundwater, high threat areas are where aquifers are "vulnerable to pollution", or have nitrate problems in drinking wells. Tier 2 lands are those without "sufficient data". The Executive Officer can on her own reclassify any lands at least once every five years. (Sections 4.1-4.3, Pages A-4, 5)

There is uncertainty if a single exceedance would throw all that watershed draining to the monitoring location into Tier 3. (There is inconsistent language in the waiver.) Would a single toxicity (i.e., Flathead minnow or Ceriodaphnia dubia) trigger Tier 3 for anything other than that specific problem and would all other areas and operations retain Tier 1? (Page A1-7) It is also unclear if staff can classify most lands to be in Tier 2 merely by alleging there is "insufficient data". If coalitions have monitored consistent with their approved MRP and the Regional MRP, that should constitute "sufficient data".

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2. On Page 4, “How Tiers are applied”, the Framework states tier classification will be “evaluated separately for different parameters, in different areas,” yet on Page A-5 the Framework states in Section 4.3, “An area would not be designated as Tier 1, if Tier 2 of 3 constituents were in the area.” Also the footnote on Page A-7, “...an area could have Tier III requirements in surface water for chlorpyrifos, and Tier 1 requirements for all other constituents in surface and groundwater.” These statements are not consistent.

3. On Page A-7 there is a chart which references Tier III as having “pesticide in surface water, nutrient in groundwater.” These need to be amended so as to clarify that these data need to be at levels which exceed Basin Plan standards.

4. The new waiver draft also has a new section (Section 4.5, Pages 8, 9) on identifying water quality threats. Two such factors are “extent of irrigated ag operations” and “intensity of operations”. Both are problematic. This should not be able to be interpreted to be the “size of farm operations” as large farms generally have the capacity to implement even greater water quality management than small farms.

5. Other new terms are the “documented management practices” and “data on the efficacy of those practices.” If there are no exceedances, there need not be any documentation of management practices, and certainly the mere lack of such paperwork (i.e., “documented”) cannot be reason to raise an area to a higher tier. As discussed below, not all management practices will be known by the coalition so as to be able to document.

6. The meaning of the following language on Page A-8 is uncertain:

“...[T]he decision on the type of implementation mechanism will be based on whether the geographic area to which the Order applies contains any Tier 3 areas for surface water or groundwater.”

7. This new waiver document, again for the first time, advances a system of imposing a mix of 1) General Order WDRs, 2) waivers and 3) WDRs on different geographical areas and operations. (Pg. A-9).

It imposes a General WDR for most of our coalition with the exception of the Tulare Lake Bottom and some irrigated pasture and foothill land. The a) Tulare Lake Bottom, b) the foothills and c) irrigated pastures would have new waivers. Also, areas which can show that they will appropriately not generate a discharge of waste whatsoever will not be regulated.

We need to have certainty as to the geographic limits of the “Tulare Lake Bottom” in each of our subcoalition areas? We had sought General Order WDRs, but this version is not exactly what we had in mind in that it bifurcates our coalition. It is also uncertain how, if at all, we can substantiate that we do not have contributions to groundwater so as to take advantage of this “no regulatory program.” The Regional Board should bear the burden of identifying those within their regulatory jurisdiction, “potential to discharge”. We have asked many times over the last two years for the Regional Board to define where percolating irrigation water “discharges to waters of the state.” No clarification has issued.

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Page A-9 indicates that evidence has to be provided to the Board that an operation “will not generate a discharge.” This is somewhat backwards as the enforcing agency has the burden of demonstrating the agency’s target is in their jurisdiction and there is reasonable evidence supporting the “allegation”.

8. The provision for having separate waivers for irrigated pastures is limited by Footnote #10 which states it is conditioned by “minimizing runoff” and “keeping cattle from watercourses.” This may be an unreasonable and unnecessary limitation calling for hundreds of miles of watercourse fences especially where the larger risk of pathogens comes from irrigation return flow from pastures and not cattle watering in foothill/mountain creeks.

9. Section 5.1 of the Framework (Page A-10) is entirely new and raises some important questions which may give rise to additional problems.

Paragraph 4 requires coalitions to “track the effectiveness of the management practices.” Paragraph 6 requires the coalitions to “confirm that growers have acknowledged the requirements.” (Page A-11)

The Regional Board should recognize that a coalition cannot guarantee it will get 100% of all growers to a meeting or for those that do attend that they will sign an attendance document or a management document. Also, a coalition cannot guarantee a particular result from the required grower outreach efforts.

10. Paragraph 4 on Page A-13 also raises issues. It requires that the coalitions governance structure provides members with direct influence. What does this actually mean? What does it require?

11. Section 5.2 properly indicates that the 100% ILRP participation is a requirement of the Regional Board. (Paragraph 1, Page A-13)

12. Section 6, Paragraph 2 requires coalitions to “document participation in outreach events.” Coalitions can provide lists of participants as members, mailings to such members and meeting attendee lists, but grower outreach is a combination of direct and indirect delivery and the coalition will not itself be privy to all the participant lists or efforts at commodity meetings, crop advisor meetings, and Farm Bureau meetings, etc. (Page A-13)

13. Section 7. The Management Plan Section 7 raises many issues which are of concern.

Coalitions as to their Tier 1 and Tier 2 lands are required to prepare a management objectives plan for each surface and groundwater which shall include a summary which addresses the management practices being employed. Why will the discharger be required to submit data electronically directly to the Regional Board? (Page A-14, first paragraph Section 6)

14. All farms shall complete a farm-specific identification of their management practices. (Paragraph 3, Page A-16) First, these significant regulatory requirements should only impact those farms in areas with evidence of water quality problems. Second, a farm has hundreds of individual management

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practices. Some of those practices are irrelevant, some proprietary, and many of which will not be advanced by farmers if these documents may become public. Not only are management practices affecting water quality near endless and contain proprietary information the coalition should not have to store these thousands of documents (Paragraph 3, Page A-16).

15. Tier 3 lands in nitrate impact areas would be required to advance nutrient management plans certified by a “certified crop advisor.” This report will have to track nutrient inputs and outputs which is supposed to identify nitrates filtering below the crop root zone. The Executive Office will direct the actual filing of these requirements, but these will be required to be filed with the coalitions. (Paragraph 4, Page A-17, also Paragraph 10, Page A-16)

Farmers should not have to make their farm plans public or shared with other farm operations (i.e., coalitions). Moreover, the coalitions are in no position to second guess a farm fertilizer strategy put together by the farm’s crop advisor.

The Nutrient Management Plan language requires farmers to “track nutrient inputs and outputs. First, there are many nutrients other than nitrogen/nitrates, so this should be narrowed. Secondly, the “outputs” likely means the nitrogen in the crop harvested, but most nitrogen is in crop residue and tied up in the soil, which has considerable assimilative capacity. Consequently, not nearly all nitrates not taken away in harvest migrates to underlying aquifers. In respect to field corn, cotton, grapes or oranges very little of the nitrate is in the corn kernel, cotton fiber, the grape or the orange. Most of the nitrate is tied up in plant residue or the vine or tree.

16. There is also a new requirement which triggers coalitions to prepare a surface water quality management plan (SQMP). (Paragraph 5, Page A-17) The new trigger for such is “for any parameter for which there is degradation of high quality waters.” This is unclear both as to the parameter and the standard. Our irrigation water below our reservoirs or distributed out of our first lined conveyances is not “high quality water”. These SQ management plans are anticipated to require that the farmer shall implement management practices to achieve best practical treatment and controls (BPTC). This is a new regulatory standard to be imposed by the waiver. It also states that monitoring will be required to test the effectiveness of such management practices. It is unclear what would be required to be monitored beyond what is required by the MRP.

17. There is also the requirement for a new groundwater quality management plan (GQMP). (Paragraph 6, Page A-18) An important exception to such new GQMP is if there is a local ground water plan approved by the Regional Board. In areas of nitrate concerns the local (SB 1938 or IRMP) program would have to include as an element “nutrient budgeting”.

We are supportive of the recognition of such local groundwater programs and realize the importance of including nitrates, but the Regional Board should recognize that these plans are overseen by DWR and the amendment processes requires significant time and bringing many parties together. (Footnote 20, Page A-18) It should also be recognized that IRWMs are public creations and therefore should satisfactorily accommodate opportunity for any public input as to these plans. (See point 20, below.)

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The GQMP must require the coalition to identify those ag practices, which may be causing the problems and to identify those which may need to be amended. As explained below, this may not be so easy as to groundwater.

18. Page A-18, #6, the Framework states “Ground WQ Management Plan must be developed for any parameter, for which irrigated agriculture could be a source.” Does this mean all impairments including the lower threat constituents? How does this document intend to identify the source of these problems? It is also unclear if Surface and Groundwater Quality Management Plans (SQMP and GQMP) are only required in Tier 3 areas.

19. The waiver expressly provides that the Executive Officer has authority to demand amendments to SQMP and GQMP. In many places in this draft Framework it reserves for the Executive Officer too much independent authority. Some of this authority actually resides with the Board. This is generally true as to “additional” demands and is especially true in dealing with IRMPs which are principally governed by DWR.

20. Paragraph 8, Page A-19 is a critical new area which provides public input to both SQMP and GQMPs. The detail envisioned in these plans makes it quite inappropriate for public distribution much less opening these farm practice management plans to public participation. If these members of the public want to farm, they should buy some land and a mule. They should not try to farm vicariously by second guessing our farmers’ management.

The staff should explain when and how “Public Input on Water Quality Management Plans” by other interested stakeholders (Page A-19, Paragraph 8) would take place? What types of management plan decisions does the staff envision they and the public should be involved in?

21. As stated above, throughout the document the proposal tries to shift much authority to the Executive Officer which actually should be retained by the Board. Such examples also include imposing additional requirements such as best management practice field studies.

22. Paragraph 4 on Page A-22 references coordination with other programs, such as the Dairy Order. This sounds nice, but the dairy general order monitoring is targeted for limited constituents and is an offshoot of a point source program. Harmonization opportunities may therefore be limited. Replacing coalition monitoring requirements with surface ambient, SWAMP, DPR and GAMA may, however, offer some relief to coalitions.

23. Paragraph 5, Page A-22 calls for assessment and trend monitoring for groundwater. It must be realized that the groundwater is not farm specific. Further, the groundwater underlying a farm or underlying a monitoring point may be very old water sourced from many miles away. Consequently, trend monitoring is likely not to show any results for decades, if at all (also Paragraph 8, Page 31).

24. On Page A-23, Paragraph 6.b, Data Gaps, the Framework references “vulnerable groundwater aquifers” in Footnote 23 as “potentially vulnerable groundwater aquifer is one in which one or more domestic wells exist and data are not available...” How does the staff define somewhere as vulnerable if there is no data to support that assessment?

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25. Section 10, Page 24 deals with compliance time schedules. The 5-10 year compliance for groundwater may be totally unreasonable. We recognize it does indicate that compliance may be shown by mere improvement, modeling or nutrient budgeting. These factors, however, will have no bearing in places with a) very old water, b) natural impairment, or c) where impacts are sourced many miles away.

26. Section 13, Page A-27 outlines requirements for surface, groundwater and individual farm management plans. It requires the tracking of management practice implementation and monitoring to track effectiveness of management practices. (Paragraphs 7 and 8 of Page 28, and Paragraphs 4 and 5 of Page 30)

A coalition will have limited opportunity to know or report on the hundreds of management practices on each of the thousands of growers and hundreds of thousands of fields in the coalition area. Similarly, monitoring will reflect a collection of all the management practices in all the farms in the local watershed and not the result of any single management practice. Similarly, groundwater may take decades to show the results of management improvements. (Paragraph 9 of Page 29, Paragraph 8 of Page 31)

27. Even though we fully understand this Framework strives to have multiple strategies and multiple levels of responsibility (suggested by many of us), we should step back and consider if we have created an unmanageable mess in so doing.

Using our Southern San Joaquin Valley Water Quality Coalition as an example, this new document will be asking the coalition and subcoalitions to manage a complex and manifold system.

1. There will be a General Order having lands divided into three overlapping tiers for each surface and groundwater. (This would result in nine permeations.)

2. Some lands will not drain to surface water and some will not drain to groundwater, and some to neither. Therefore, there will be three permeations of "exempt from jurisdiction" lands. These lands would be covered by neither the General Order or waivers, but the coalition would have to "qualify them". (3 permeations)

3. Each of our four sub-watersheds drain to the Tulare Lake bottom and the lake bed portions of each coalition would be covered by separate new waivers (4 permeations).

4. Some foothill and irrigated pastures would each be covered by separate new waivers (2 permeations).

5. Some of the foothill and irrigated lands will not meet the footnote 10 requirement (fence creeks) so these lands will "re-enter" from the waiver to the General Order presumptively in a special Tier 1 category (1 permeation).

On balance, each of our four subcoalitions could and likely would have a total of 19 different programs which, across the entirety of the coalition, would total up to 76 possible combinations, all of which would have to be administered and have differing monitoring and reporting obligations.

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28. This nearly 70-page new Framework document contains fundamental new provisions never before mentioned or advanced in any of the seven preceding waiver documents or previously advanced over the last two years. We were provided only a few days prior to the comment deadline to assemble these comments, which should be regarded as preliminary and may be supplemented.

Sincerely,

A handwritten signature in blue ink, appearing to read 'W. Thomas', with a long horizontal flourish extending to the right.

William J. Thomas  
of BEST BEST & KRIEGER LLP

WJT:lmg

cc: Central Valley Regional Water Board Chair and Members  
Southern San Joaquin Valley Water Quality Coalition